



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
SECOND APPEAL NO.523 OF 2019
WITH
CIVIL APPLICATION NO.10706 OF 2019
IN
SECOND APPEAL NO.523 OF 2019**

1. Smt. Ramabai Wd/o Santoshkumar Jain,
age 60 years, occ. housework,
R/o 110/7 MHADA Colony, Bansilal Nagar,
Station Road, Aurangabad
 2. Deepak S/o Santoshkumar Jain,
age 35 years, occ. business,
R/o 110/7 MHADA Colony, Bansilal Nagar,
Station Road, Aurangabad
- ..Appellants
(LRs of Original
Defendant No. 1)

Versus

1. Waman S/o Shankar Ghorpade,
age 75 years, occ. agriculture
R/o Kachner, Tq. & Dist. Aurangabad
At Present Bhavsingpura, Aurangabad
(Original plaintiff-died- Through LRs)
- 1-1 Ahilyabai wd/o Waman Ghorpade,
age 75 years, occ. agriculture,
R/o Kachner, Tq. & Dist. Aurangabad
- 1-2 Yashpal W/o Waman Ghorpade,
age 40 years, occ. business,
R/o Kachner, Tq. & Dist. Aurangabad
- 1-3 Ashok s/o Waman Ghorpade,
age 65 years, occ. business,
R/o Kachner, Tq. & Dist. Aurangabad
- 1-4 Baburao S/o Waman Ghorpade,
age 60 years, occ. business
- 1-5 Sheela w/o Bhiva Pakhare,
age 62 years, occ. household
R/o Bhavsingpura, Aurangabad
- 1-6 Meena w/o Baburao Shelar,
age 35 years, occ. household
R/o Kachner, Tq. & Dist. Aurangabad

2. Bhaskar S/o Kamlaji Jadhav,
Age 55 years, occ. agriculture,
R/o Kachner, Tq. & Dist. Aurangabad
(Original Defendant No.2.)

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Mr. Ashok A. More, Advocate for the Appellants.

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CORAM : S. G. CHAPALGAONKAR, J.
DATED 12th DECEMBER, 2024.

ORDER:-

1. The appellants/legal representatives of defendant no.1 impugns judgment and decree dated 27.04.2018 passed by District Judge, Aurangabad in Regular Civil Appeal No.301/2010, thereby upholding judgment and decree dated 06.08.2010 passed by 2nd Joint Civil Judge, Junior Division, Aurangabad in Regular Civil Suit No.298/1999. (Hereinafter, parties are referred as per their original status for the purpose of convenience and brevity).

2. The respondent/plaintiff instituted Regular Civil Suit No.298/1999 asserting his ownership and possession over the suit land gut no.637 situated at Kachner, Tq. and Dist. Aurangabad. According to plaintiff, in family partition he received aforesaid land. The specific share in the property was allotted to him in execution of partition decree in Regular Civil Suit No.666/1981. Since then, he was in possession. However, defendant no.1, illegally encroached upon 5R land on the basis of sale deed executed by defendant no.2. Consequently, plaintiff sought relief of declaration, mandatory injunction and perpetual injunction.

3. The defendant no.1 refuted the plaintiff's claim contending that he was not party to the partition suit filed by plaintiff i.e. Regular Civil Suit No.666/1981. He purchased suit land under registered sale deed dated 17.10.1996.

4. The Trial Court framed the issues. Parties recorded their evidence. Finally, Trial Court accepted plaintiff's claim for ownership and possession over the suit property and declared that sale deed dated 17.10.1996 executed by defendant no.2 in favour of defendant no.1 is null and void. The defendants were further directed to remove standing structure of 60 ft. x 30 ft. over 5R area. The Appellate Court concurred with the findings of the Trial Court and dismissed the Appeal filed by defendant no.1.

5. Mr. More, learned Advocate appearing for the appellants submits that appellants had purchased 7R land from defendant no.2. The plaintiff raised his claim in respect of land to the extent of 5R. Even, Courts below have recorded findings in respect of 4 acre of land under sale deed dated 17.10.1996, which according to him suggests non-application of mind. He would further submit that previously plaintiff had instituted Regular Civil Suit No.346/1998 claiming relief of temporary injunction. His application below Exhibit-5 was rejected. Thereafter, plaintiff withdrawn suit and instituted present proceeding. Therefore, it is apparent that defendant no.1 was in possession of property and

suit has been instituted with false plea. He would submit that although there are concurrent findings of Courts below, those are perverse and deserves to be interfered in this appeal.

6. Having considered submissions advanced, it can be observed that plaintiff had instituted Regular Civil Suit No.666/1981 seeking partition and separate possession of the ancestral property against his brother. The suit was decreed on 19.10.1981. In execution of decree and partition, he was put into possession of gut no.637 on 19.09.1991. There is no dispute as regards to the aforesaid factual matrix.

7. In the backdrop of aforesaid factual scenario, defendant is coming with a plea that he acquired ownership of 7R land on the basis of registered sale deed dated 17.10.1996 executed by defendant no.2. Accordingly, he erected construction over 60 ft. x 30 ft. area. Both the Courts have concurrently held that plaintiff was allotted Hissa No.1 in gut no.637 as can be seen in the map at Exhibit-64. The evidence of TILR-Tulsiram Runjaba Salve proves the fact that plaintiff was put into possession of Hissa No.1 in gut no.637 during the course of execution of decree. In that view of the matter, there cannot be dispute as regards to the ownership and possession of plaintiff over the suit property.

8. So far as claim of the defendants, they rely upon sale deed dated 17.10.1996 executed by defendant no.2, thereby alienating

5R land from gut no.637. The defendant no.2 failed to file his written statement in the suit. There is nothing on record to depict that defendant no.2 was holding title or possession of the suit land on the date of execution of sale deed.

9. Per contra, plaintiff has duly proved his ownership and possession on the basis of partition decree followed by delivery of possession in execution of decree. The Courts below have, therefore, rightly arrived at conclusion that defendant no.2 had no title in respect of land and in absence of title with defendant no.2, defendant no.1 could not have derived title or possession over the suit property. Consequently, sale deed executed by defendant no.2 in favour of defendant no.1 is held to be invalid and inconsequential. As such, plaintiff's claim for declaration of the ownership and mandatory injunction has been granted under impugned judgment and decree. No substantial question of law arises for consideration in this second appeal.

10. Consequently, Second Appeal stands dismissed.

11. In view of dismissal of Second Appeal, Civil Application does not survive and accordingly stands disposed of.

(S. G. CHAPALGAONKAR)
JUDGE